Project On Government Oversight
Exposing Corruption Exploring Solutions www.POGO.org

August 30, 2005

Ms. Laura Auletta, DFO
c/o General Services Administration
1800 F Street, N.W., Room 4006
Washington, D.C. 20405

Dear Ms. Auletta:

In response to the Acquisition Advisory Panel's (the "Panel") request for additional information, I present the following materials for the Pan el's review of federal acquisition laws and regulations. I am fully aware of the daunting task and the accelerated schedule that are mandated in the Panel's Charter and I genuinely hope that the information and materials presented herein are a help to the Panel's efforts.

I. Overview

On May 17, 2005, the Project On Government Oversight ("POGO") testified before the Panel, highlighting concerns in five areas that have been the target of contractor-driven "reforms." I recommended that the Panel should strengthen federal government contracting laws and regulations in the following areas:

1. Negotiations – To make every effort to get the best value for the taxpayer, the government must promote aggressive arm's-length negotiations with contractors;

2. Competition – To better evaluate goods and services and get the best value, the government must encourage "competition" so that it can correct the current trend of entering into non-competitive contracts in nearly 50 percent of government purchases;

3. Accountability – To ensure that taxpayer dollars are being spent responsibly, the government must regularly monitor and audit contracts after they are awarded;

4. Transparency – To regain public faith in the contracting system, the government must ensure that the contracting process is open to the public, including contractor data and contracting officers' decisions and justifications; and

5. Contracting Vehicles – To prevent abuse, the government must ensure that certain contract types that have been abused in the past (including performance-based contracts, interagency contracts, time & material contracts, share-in-savings contracts, purchase card transactions,

666 Eleventh Street, NW
Suite 500
Washington, DC
20001-4542
Phone: 202-347-1122
Fax: 202-347-1116

www.POGO.org
pogo@pogo.org

commercial item purchases, and other transaction authority) are used in limited circumstances and are accompanied by audit and oversight controls.

There are a number of examples of contracting abuses, including Air Force contracts with Boeing that were administered by Darleen Druyun; the misuse of government credit cards; unjustified Iraq sole source reconstruction contracts; the misclassification of the C-130J as a "commercial item" – a designation that removes most, if not all, government oversight and contractor accountability; and changes or amendments that fall outside the scope of the initial contract. All of those instances resulted from reforms that were intended to "cut red tape." As a result of those "contractor-friendly" initiatives, the current buying system is plagued with illegally awarded, out-of-scope, and overpriced contracts, and contracts that are awarded on a non-competitive basis.

II. Recent Events

Since POGO's May testimony before the Panel, there has been much activity in the government contracting area. For instance, GAO published a report detailing the lack of use of share-in-savings ("SIS") contracts for multiple reasons, including:

- Lack of implementing regulations;
- Difficulty determining baseline costs;
- A belief that the return on investment using share-in-savings contracts is insufficient;
- Concerns among agency officials that they still would have to obtain funding for cancellation and termination liability, which can be a significant sum; and
- Too few acquisition employees who have been trained to use the share-in-savings contracting technique.[1]

The GAO issued another report highlighting concerns with Energy Savings Performance Contracts ("ESPC").[2] Those contracts have been cited by proponents as a significant performance-based

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[1] Government Accountability Office, "Federal Contracting: Share-in-Savings Initiative Not Yet Tested," GAO-05-736, July 2005, pp. i. Available at http://www.gao.gov/new.items/d05736.pdf.

[2] Government Accountability Office, "Energy Savings: Performance Contracts Offer Benefits, but Vigilance Is Needed to Protect Government Interests," GAO-05-340, June 2005. Available at http://www.gao.gov/new.items/d05340.pdf.

contracting success. Despite those claims, in this report the GAO stated that it was concerned that ESPC savings are not covering costs and that a lack of competition "could lead to higher costs."[3] As the Panel members may recall, GAO stated last year that six ESPC projects "cost 8 to 56 percent more than had the projects been funded at the same time with upfront funds."[4]

Another recent report was the GAO's study of the Defense Department's ("DoD") use of GovWorks and FedSource – two of the franchise funds that the DoD relies upon to buy good and services.[5] In its report "Interagency Contracting: Franchise Funds Provide Convenience, but Value to DoD is Not Demonstrated,"[6] the GAO concluded that DoD reliance on franchise funds has "not always ensured fair and reasonable prices while purchasing goods and services. The franchise funds also may have missed opportunities to achieve savings from millions of dollars in purchases, including engineering, telecommunications, or construction services."[7] The report also stated that "FedSource generally did not ensure competition for work, did not conduct price analyses, and sometimes paid contractors higher prices for services than established in contracts with no justification provided in the contract files."[8]

The GAO's report coincides with a DoD Inspector General ("IG") report also reviewing the federal supply schedules which found that General Services Administration ("GSA") and DoD officials "did not comply with the U.S. Constitution, appropriations law, and the Federal Acquisition Regulation

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[3] *Id.* at 5-6.

[4] Government Accountability Office, "Capital Financing: Partnerships and Energy Savings Performance Contracts Raise Budgeting and Monitoring Concerns," GAO-05-55, December 2004, p. 7. Available at http://www.gao.gov/new.items/d0555.pdf.

[5] "Franchise funds" are government-run fee-for-service organizations that provide common administrative support services, including contracting services, to other government agencies. In other words, franchise funds handle government buying from start to finish (i.e., conducting contract competitions, making a contract award, administering the award, and closing out when the contract ends). The franchise fund agencies establish fees (a percentage of the total contract value) to cover their total estimated costs for providing the services. The fees awarded on those interagency contracting vehicles provide little or no incentive to keep costs down.

[6] Government Accountability Office, "Interagency Contracting: Franchise Funds Provide Convenience, but Value to DoD is Not Demonstrated," GAO-05-456, July 2005. Available at http://www.gao.gov/new.items/d05456.pdf.

[7] *Id.* at i.

[8] *Id.*

when making purchases through the General Services Administration."[9] The IG's review of 75 purchases found that:

> • 68 purchases lacked acquisition planning to determine that contracting through GSA was the best alternative available;
>
> • 74 purchases had inadequate interagency agreements outlining the terms and conditions of the purchases;
>
> • 38 purchases were funded improperly; the requesting DoD organization either did not have a bona fide need for the requirement in the year of the appropriation or did not use the correct appropriation to fund the requirement;
>
> • 44 purchases were unsupported by an adequate audit trail; and
>
> • The mismanagement of funds and lack of acquisition planning for the funds transferred to GSA over the last 5 years has caused between $1 billion and $2 billion of DoD funds to either expire or otherwise be unavailable to support DoD operations.[10]

Additionally, on July 26, 2005, GAO's David Cooper testified before the Senate Subcommittee on Federal Financial Management, Government Information, and International Security of the Committee on Homeland Security and Governmental Affairs (the "Subcommittee") about GSA's schedules and fees.[11] Cooper's written testimony stated: "In February 2005, we completed our most recent review of the multiple award schedules program and found that pricing problems persist and that the number of pre-award audits continued to decline. We concluded that GSA was continuing to miss opportunities to save hundreds of millions of dollars."[12] Cooper added:

> In summary, GSA has used these two key price negotiation tools [pre-award and postaward audits] on a limited basis. When GSA has used pre-award and postaward audits, **it has been able to avoid or recover hundreds of millions of dollars in overcharges**. In recent years, however, the use of these pricing tools has declined

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[9] Department of Defense Office of the Inspector General, Audit, "DoD Purchases Made Through the General Services Administration," Report No. D-2005-096, Project No. D2004-D000CF-0238.000, July 29, 2005, p. i. Available at http://www.dodig.osd.mil/audit/reports/FY05/05096sum.htm.

[10] *Id.* at pp. i-ii.

[11] Government Accountability Office, "Contract Management: Opportunities Continue for GSA to Improve Pricing of Multiple Award Schedules Contracts," GAO-05-911T, July 26, 2005. Available at http://www.gao.gov/new.items/d05911t.pdf.

[12] *Id.* at i.

> dramatically – despite dramatic increases in program sales. Consequently, GSA has less assurance that vendor-supplied pricing information is accurate, complete, and current, and its ability to deter overpricing and recover overcharges has been minimized. By delaying action to address its contract pricing problems, GSA continues to miss opportunities to minimize prices paid for goods and services and save significant sums of federal dollars.[13] (Emphasis added.)

It is not surprising that the contracting world wants to keep out postaward audits from the government's contract oversight tool box. Kathleen S. Tighe, Counsel to the GSA Inspector General, confirmed the GAO's recovery figures. Tighe testified before the Subcommittee that, "[i]n the three-year period prior to the 1997 rule that eliminated postaward audits, fully 84% of postaward audits contained findings of defective pricing," recovering "over $110 million in civil fraud penalties in the eight years prior to the rule change."[14] Both Cooper and Tighe urged GSA to reinstate postaward audit rights for the government.

John Ames, Director of the Contract Review and Evaluation Division of the Office of Inspector General, Department of Veterans Affairs, testified before the Subcommittee that 240 pre-award audits have resulted in the "better use" of $2.2 billion.[15] Ames added that "238 post-award audits were conducted, resulting in approximately $319 million in recoveries for the VA."[16]

The July hearing before the Subcommittee, which was chaired by Senator Tom Coburn (R-OK), brought out two interesting revelations. The first revelation came from David Cooper when he testified that GSA contracting officials spend more time working on awarding contracts than obtaining the best deals for the government. As POGO testified before the Panel, contract monitoring has taken a back seat to quickly awarding government contracts. Cooper's statement highlights the fact that aggressive negotiations as well as genuine contract oversight are lacking in the current system. It also shows the inherent conflict of interest that interagency contract fees create because there is no incentive for GSA to negotiate the lowest price. In other words, GSA

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[13] *Id.* at 1-2.

[14] Statement of Kathleen S. Tighe, Counsel to the Inspector General, United States General Services Administration, Before the Subcommittee on Federal Financial Management, Government Information, and International Security of the Committee on Homeland Security and Governmental Affairs, "GSA – Is the Taxpayer Getting the Best Deal?", July 26, 2005, p. 5. Available at http://hsgac.senate.gov/_files/072605Tighe.pdf.

[15] Statement of John B. Ames, Director of the Contract Review and Evaluation Division Office of Inspector General, Department of Veterans Affairs, Before the Subcommittee on Federal Financial Management, Government Information, and International Security of the Committee on Homeland Security and Governmental Affairs, "GSA – Is the Taxpayer Getting the Best Deal?", July 26, 2005, p. 2. Available at http://hsgac.senate.gov/_files/072605Ames.pdf.

[16] *Id.*

makes more money from other agencies by promoting a quantity over quality theory of interagency contracting.

The second revelation came during Senator Coburn's inquiry into the government's ability to take full advantage of its massive buying leverage. The Office of Management and Budget's Administrator for Federal Procurement Policy David Savafian responded that the government does not have a system in place to allow it to determine what goods or services it buys on a yearly basis. It was shocking that the government, as the largest consumer in the world, does not have a system in place to leverage its massive buying power. Senator Coburn then requested that the government create a system to make informed buying decisions.

In addition to the comments above, I urge the Panel to consider another important government contracting issue that is costing the government hundreds of millions of dollars each year. The issue involves prime contractors who bill the government at their own labor rate(s) rather than the rate that they pay their subcontractors on Time and Material or Labor Hour ("T&M/LH") contracts. In other words, the government is "paying for subcontract hours at the negotiated [prime contractor] rates rather than at subcontract prices."[17]

The Washington Post recently reported that $20-an-hour subcontract workers were billed by the prime contractors to the government at $48 per hour.[18] Contractor representatives claim that those increased hourly rates include "risk and overhead."[19] That assertion is erroneous because the prime contractors can already add overhead, general and administrative expenses, and profit to their subcontract costs. The primes are misrepresenting their subcontract costs by submitting bills to the government claiming that the rates they are paying subcontractors are the same as their own prime contract rates. In fact, what the primes are doing is shopping their hourly rate(s) to the lowest cost subcontractor they can find. Then, for each hour the subcontractor works, the prime contractor bills its own labor rate, not the subcontractor's actual billed costs to the prime. The federal government should <u>not</u> enter into T&M/LH contracts that allow prime contractors to bill the agency for subcontracted or purchased labor or material at an amount in excess of the prime contractor's actual

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[17] *The Nash & Cibinic Report*, Vol. 17, No. 10, October 2003, p. 146.

[18] Scott Highman and Robert O'Harrow Jr., "The High Cost of a Rush to Security," *The Washington Post*, June 30, 2005, p. A01.

[19] The Information Technology Association of America, Contract Services Association, and the Professional Services Council issued press releases justifying subcontract billing practices. See http://www.itaa.org, http://www.csa-dc.org, and http://www.pscouncil.org for more information.

costs for acquiring the subcontracted or purchased labor or material.[20] The industry's over billing of the government is nothing more that an attempt at increasing prime contractors' profit margins. The problem is the government is not getting what it contracted for; instead the government is paying high labor rates to have middleman. The fact that some agencies are willing to accept higher hourly rates strongly suggests that something is wrong with the government's buying system.

As the Panel is also looking at conflict of interest and ethics issues, you may find POGO's report *The Politics of Contracting* of interest. (See Attachment A) In that report, POGO examined the revolving door between the government and large private contractors. After interviewing government officials and reviewing revolving door statutes, POGO concluded that federal conflict of interest and ethics laws are a tangled mess. As a result, conflicts of interest seem to be the rule rather than the exception. Government employees struggle with a decentralized system of ethics laws and regulations; a multiple-layer system so convoluted that ethics officers and specially-trained lawyers hired to enforce them have pushed for a more simplified system.

POGO's report provided thirteen recommendations that would c orrect other revolving door weaknesses. A full copy of POGO's report is included with this letter. (See Attachment A) In addition, I have included an excerpted copy of the report, which I hope will be provided to Panel members. (See Attachment B)

III. Recommendations

My concern is that new contracting vehicles, degraded oversight controls, and the lack of technical training for contract officers and administrators will waste taxpayer money. The spare parts horror stories of the 1980s and 1990s (including the outrageously overpriced military spending such as the $7,600 coffee maker and the $436 hammer, which POGO fought to correct twenty years ago) will be reborn in tomorrow's service acquisition rip-offs if controls are not introduced or reintroduced to the system. That prediction is based on the fact that federal spending on services has exploded in recent years and comparable weaknesses that caused the 1980's overcharges are being replicated in services contracting today.

The above referenced GAO reports, congressional testimony, revelations, and press stories highlight many concerns with the current government purchasing system. There are genuine problems that need to be corrected in contracting vehicles that were born from the reinventing and streamlining government movement. GSA is pushing share-in-savings contracts when few contracting officers are qualified to administer such contracts and contractors are not willing to accept the risks that they

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[20] On July 25, 2005, Senator Levin (MI) sponsored Senate Amendment 1497 to the National Defense Authorization Act for Fiscal Year 2006 (S. 1042). The amendment places restrictions on subcontractor hourly rates that prime contractors can bill to the federal government on time and materials and labor hour contracts. Available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2005_record&page=S8856&position=all.

create. Interagency contracting vehicles are not protecting taxpayer interests -- specifically, those contracting vehicles lack aggressive negotiations and full and open competition and therefore result in higher costs. Additionally, the lack of accountability and a system that is fully open to the public hinders the government's ability to hold contractors accountable.

In the short term, POGO urges the Panel to endorse a buying system that will:

1. Prohibit noncompetitive contracting, absent a publicly available written justification;

2. Require aggressive negotiations by providing incentives to get the best price and value that takes full advantage if the government's massive buying power;

3. Closely monitor contracting vehicles that place taxpayer dollars at risk;

4. Hire additional auditors, contracting officers, contract administrators, procurement and cost/price analysts, and market researchers;

5. Reinstate postaward audits (whether or not they are used by the private sector);

6. Mandate the increased use of pre-award and compliance audits;

7. Consolidate the schedule system – 54 schedules prevents leveraging of buying power;

8. Prevent prime contractors from billing an agency for inflated subcontracted or purchased labor or material on T&M contracts; and

9. Close loopholes in conflict of interest and ethics laws:

   A. Prohibit, for a specified period of time, political appointees and Senior Executive Service policymakers (people who develop rules and determine requirements) from being allowed to seek employment with contractors who significantly benefited from the policies formulated by the government employee.

   B. Close the loophole allowing former government employees to work for a department or division of a contractor different from the division or department they oversaw as a government employee. That loophole allowed Darleen Druyun to land a well-paid position at Boeing after currying favor with the company for many years in her capacity as a Pentagon procurement official.

This fall, POGO will be authoring two reports that may be of interest to the Panel. The first report will detail a government buying system more adept at protecting taxpayers' interests. Contractors are at the forefront of proposing reforms that place their interests above those of the taxpayer; it is time for others to propose a fair, effective, efficient, and accountable government buying system. The second report will investigate the declining status of inherently governmental functions within the federal government and propose specific jobs that should be performed by career civil servants rather than contractor employees. POGO is gathering agency job inventories and inherently governmental function justifications to determine if such jobs have been contracted out. I will keep the Panel updated on the progress of those forthcoming reports.

IV. Requested Materials

During the course of my testimony, I referenced a web site that I consult to learn what contracting experts are saying about proposed legislation and new and improved contracting vehicles. That web site is "Where in Federal Contracting?"[21] (See Attachment C) The web site offers government contracting materials as well as summaries and opinions on contracting topics from current and retired contracting officials. Panel members may want to review the issues raised therein and invite some of the regular "posters" to appear before the panel to discuss the current contracting system.

Furthermore, I highly recommend that the Panel review a lecture by Judge Stephen M. Daniels, Chairman of the General Services Board of Contract Appeals. (See Attachment D) With the permission of Judge Daniels, I have included a copy of his remarks titled "An Assessment of Today's Federal Procurement System." (A copy of the lecture can be found at http://www.pogo.org/m/cp/cp-daniels2002.pdf) Judge Daniels's August 2002 lecture remains relevant to the Panel's mission and is current in scope. In fact, Judge Daniels's lecture highlighted four guiding principles to improve the way the government buys goods and services: (1) open competition; (2) a fair system of evaluating offers; (3) awarding contracts that are in the "best overall interest of the taxpayers"; and (4) transparency so that "participants and taxpayers understand how it is being operated and can hold agencies accountable for their actions." I urge the Panel to review Judge Daniels's remarks and to invite him to testify before the Panel prior to the end of the investigatory phase of its review.

During POGO's testimony before the Panel, questions were raised about POGO's funding sources. To provide a more detailing accounting to the inquiry, I have included POGO's fiscal year 2004 list of foundations and individual donors who support POGO and POGO's 2003 Annual Report, which details the organizations funding sources on pages 14-15. (See Attachment E)

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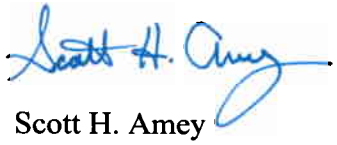
[21] Available at http://www.wifcon.com/.

If the Panel has any additional questions or requires further information, please contact me. Thank you for the openness that the Panel has provided and best wishes in its efforts.

Sincerely,



Scott H. Amey
General Counsel
scott@pogo.org

Attachments

cc: Sen. Collins
Sen. Lieberman
Sen. Coburn
Sen. McCain
Sen. Levin
Sen. Byrd
Sen. Durbin
Rep. Davis
Rep. Waxman
Judge Stephen M. Daniels

Attachment A

POGO Report
The Politics of Contracting
June 29, 2004

see: http://www.pogo.org/p/contracts/c/co-040101-contractor.html

Attachment B

Excerpts from POGO Report
The Politics of Contracting
June 29, 2004

Project On Government Oversight
Watchdog since 1981

Excerpts from the Project On Government Oversight's Report
The Politics of Contracting
June 29, 2004

Full copies of the report are available upon request or at
http://www.pogo.org/p/contracts/c/co-040101-contractor.html

666 11th Street, NW, Suite 500 • Washington, DC 20001-4542 • (202) 347-1122
Fax: (202) 347-1116 • E-mail: pogo@pogo.org • www.pogo.org

Project On Government Oversight

The Politics of Contracting

June 29, 2004

666 11th Street, NW, Suite 500 • Washington, DC 20001-4542 • (202) 347-1122
Fax: (202) 347-1116 • E-mail: pogo@pogo.org • www.pogo.org
POGO is a 501(c)3 organization

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Caleb Rowe
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I. EXECUTIVE SUMMARY

Throughout 2003 and 2004, there was extensive media coverage involving Pentagon official, Darleen Druyun, who landed a high-level position with defense contractor Boeing after currying favor with the company through contracting decisions. At the time of her hiring in early 2003, the Project On Government Oversight (POGO) called Druyun's move to Boeing the worst case of the revolving door in recent memory. Yet, her new position received little attention from the media or policymakers, demonstrating a resounding lack of concern for the real and perceived abuses by federal officials going through the revolving door to the private sector. In order to more fully understand the revolving door and political influence that the federal government's top contractors exert over decision-making, POGO launched an investigation and presents its findings here.

POGO examined the current top 20 federal government contractors from January 1997 through May 2004. In FY 2002, those top 20 contractors received over 40% of the $244 billion in total contracts awarded by the federal government. For each of those contractors, POGO's investigation documented campaign contributions, lobbying expenditures, government contract awards, and examples of federal officials moving through the revolving door to those companies. POGO's report provides individual profiles of each company. The primary findings include:

- By examining corporate press releases and filings, POGO identified 291 instances involving 224 high-ranking government officials who shifted into the private sector to serve as lobbyists, board members or executives of the contractors. POGO found that at least one-third of the high-ranking former government employees who went to work for or to serve on the board of a government contractor were in agency positions allowing them to influence government contracting decisions. Generally, revolving door laws do not apply to the most senior policymakers who ultimately have the most power in shaping programs and policies that benefit contractors.

- At least two-thirds of the former Members of Congress who are lobbying or have lobbied for the top 20 government contractors served on Authorization or Appropriations Committees that approved programs or funds for their future employer or client while they served in Congress. Those committees included: Armed Services, Appropriations, Intelligence, Ways and Means, and Commerce. Since 1997, Lockheed Martin – the contractor receiving the most federal award dollars – has hired twice as many former Members of Congress than the next closest contractor.

- In the last three completed election cycles and the current cycle (as of December 2003), the top 20 contractors, and their employees, made $46 million in campaign contributions and spent almost $400 million on lobbying. Their political expenditures have helped to fuel $560 billion in federal contracts. Since 1997, the contractors have spent (on average) 8 cents on campaign contributions and

lobbying expenditures for every $100 they have received from the federal government in contract awards. Of course, not all money spent on lobbying and political contributions can be directly tied to government contracts.

- In FY 2003, out of nearly 23,000 white collar crime or official corruption cases prosecuted by the Department of Justice, only 12 (0.5%) involved revolving door allegations and only two revolving door cases resulted in convictions.

- Until 1976, government contractors were barred from making contributions to a political party, committee, or candidate for public office.

- Previously, the DoD kept statistics of former civilian and military employees hired by private contractors. In 1996, however, revolving door laws were "simplified" and, as a result, ending any illusion of transparency of DoD's revolving door.

After interviewing government officials and reviewing revolving door statutes, POGO concluded that federal conflict of interest and ethics laws are a tangled mess. Government employees struggle with a decentralized system of ethics laws and regulations – a multiple-layer system so convoluted that ethics officers and specially-trained lawyers hired to enforce them have pushed for a more simplified system.

At the same time, revolving door protections are weakest against abuse by high-level officials. Two of POGO's recommendations would, if implemented, correct flaws in the system, which led to high-profile scandals in recent years:

- Prohibit, for a specified period of time, political appointees and Senior Executive Service policymakers (people who develop rules and determine requirements) from being able to seek employment from contractors who significantly benefitted from the policies formulated by the government employee.

- Close the loophole allowing former government employees to work for a department or division of a contractor different from the division or department that they oversaw as a government employee. That loophole allowed Darleen Druyun to land a well-paid position at Boeing after currying favor with the company for many years in her capacity as a Pentagon procurement official.

II. INTRODUCTION

> Each [executive branch] employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations.[1]

While a worthy goal, the "basic obligation of public service" stated above is undermined by the frequency of government employees leaving to work for federal contractors. Depending on whether the government employee is going to work for a contractor or leaving private industry to work for the government, they are placed in positions when they had or will oversee or regulate their current or former employer. This practice, known as the revolving door, is not a new phenomenon. On May 8, 1965, President Lyndon B. Johnson issued Executive Order (E.O.) 11,222 which instructed agencies to establish "standards of ethical conduct for government officers and employees."[2] The purpose of this and other conflict of interest and ethics laws was to protect the integrity of the government's system of buying goods and services from contractors. President Johnson stated that "every citizen is entitled to have complete confidence in the integrity of his [or her] government."[3]

American taxpayers have witnessed a series of mega-mergers that have transformed large government contractors into a small universe of formidable lobbying and influence-peddling machines. The politics of contracting have become so pervasive and entrenched, even Congress is rarely able to stem its power. Additionally, relaxed federal contracting laws and regulations, and frequently inadequate oversight of the entire contracting system, have added to federal contractors' influence over the way the U.S. government (the largest consumer in the world) buys goods and services. In particular, many unneeded or ill-conceived weapons systems are purchased and sweetheart deals are made because of conflicts of interest that have become endemic to the system.

POGO has examined the top 20 federal government contractors from Fiscal Year (FY) 2002 (see Chart 1).[4] Since 1997, the federal government has awarded over one trillion dollars to federal contractors. In FY 2002, the federal government spent over $244 billion on contracts for

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[1] 5 C.F.R. § 2635.101(a) (2004) ("Basic obligation of public service").

[2] *See* 48 C.F.R. § 3.101-3(a) (2004).

[3] Exec. Order No. 11,222, 30 Fed. Reg. 6439 (May 8, 1965), *available at* http://www.archives.gov/federal_register/codification/executive_order/11222.html.

[4] *Top 200 Government Contractors*, Government Executive Magazine, Aug. 2003, at 24, *available at* http://www.govexec.com/top200/03top/top03s3s1.htm.

CHART 1.

Money Spent by the Top 20 Federal Contractors to Influence Decisions and Secure Future Cointracts FY 1997 through 2004

COMPANY (Based on contract dollars in FY 2002)		TOTAL CAMPAIGN CONTRIBUTIONS		INDIVIDUAL CONTRIBUTIONS		PAC CONTRIBUTIONS		SOFT MONEY CONTRIBUTIONS *		LOBBYING EXPENDITURES		FEDERAL CONTRACT AWARDS	
1	LOCKHEED MARTIN	1	$7,338,676	3	$1,104,734	1	$3,714,891	1	$2,519,051	4	$47,249,780	1	$141,742,357,277
2	BOEING	3	$6,076,243	4	$1,020,109	4	$2,997,654	2	$2,058,480	3	$58,298,310	2	$110,224,322,858
3	NORTHROP GRUMMAN	5	$4,225,051	10	$285,041	5	$2,661,075	5	$1,278,935	2	$60,666,629	4	$51,092,334,243
4	RAYTHEON	6	$3,491,022	7	$408,429	6	$2,236,633	7	$845,960	7	$15,580,000	3	$52,411,163,339
5	GENERAL DYNAMICS	4	$4,723,819	9	$330,351	3	$3,101,561	4	$1,291,907	5	$33,253,875	5	$35,670,009,902
6	UNIVERSITY OF CALIFORNIA	12	$1,452,123	1	$1,424,113	18	$0	16	$28,010	15	$2,858,599	7	$20,410,961,000
7	UNITED TECHNOLOGIES	7	$2,431,487	6	$527,587	8	$1,118,550	8	$785,350	6	$28,875,633	6	$22,078,805,394
8	CSC	15	$422,769	14	$114,419	14	$274,850	15	$33,500	13	$3,270,000	9	$14,155,665,723
9	BECHTEL	9	$1,848,916	11	$215,116	13	$568,100	6	$1,065,700	16	$2,360,000	10	$14,102,503,648
10	SAIC	8	$2,157,079	8	$346,829	7	$1,248,500	9	$561,750	10	$8,637,700	8	$16,918,318,549
11	CARLYLE GROUP	11	$1,576,436	5	$565,089	11	$739,262	13	$272,085	9	$10,747,554	13	$9,629,997,704
12	TRW	10	$1,640,966	13	$136,907	9	$1,028,577	10	$475,475	11	$6,293,182	11	$13,517,784,000
13	AMERISOURCE BERGEN	20	$20,435	20	$19,435	18	$0	18	$1,000	20	$0	16	$6,981,856,524
14	HONEYWELL INTL.	14	$879,702	12	$172,427	12	$683,925	17	$23,350	8	$14,280,000	15	$7,754,460,071
15	HEALTH NET	18	$289,472	18	$58,300	15	$199,172	11	$315,352	18	$1,830,000	18	$6,182,696,932
16	BRITISH NUCLEAR FUELS	16	$346,968	19	$49,968	17	$17,000	12	$290,000	17	$1,925,000	17	$6,828,590,000
17	GENERAL ELECTRIC	2	$6,174,789	2	$1,407,642	2	$3,438,310	3	$1,328,837	1	$84,760,000	12	$12,996,887,348
18	L-3 COMMUNICATIONS	17	$296,620	15	$67,370	16	$183,250	14	$46,000	14	$3,103,000	19	$4,941,646,792
19	CAL TECH	19	$65,395	16	$64,895	18	$0	19	$500	19	$445,000	14	$7,852,223,000
20	BAE	13	$964,668	17	$60,903	10	$903,265	19	$500	12	$5,825,000	20	$3,333,212,144
	TOTALS		$46,422,636		$8,379,664		$25,114,575		$13,221,742		$390,259,262		$558,825,796,448

* In 2002, McCain-Feingold (the Bipartisan Campaign Reform Act) banned soft money contributions. The United States Supreme Court upheld the soft money ban in 2003.

goods and services on behalf of the American public. Over 40% of the $244 billion was awarded to the top 20 federal government contractors. Furthermore, the top 10 contractors received nearly 35% of contract dollars in FY 2002. POGO investigated the top 20 government contractors examining examples of the revolving door, campaign contributions, lobbying expenditures, and government contract award dollars. (Appendix A).

Companies spend an exorbitant amount of money to influence the awarding of government contracts. Since 1997, the top 20 contractors contributed over $46 million in total campaign contributions, of which $25 million was political action committee (PAC) contributions. For example, Lockheed Martin ranks 1st among federal contractors in total campaign contributions since 1997, contributing over $7.3 million, with $3.7 million coming from its PAC. The University of California, which ranks 6th among federal contractors in contract awards, ranks 1st in individual contributions since 1997, contributing $1.4 million.

Contractors also lobby Members of Congress to support future government contracts and favorable laws. Since 1997, the top 20 government contractors have spent over $390 million in lobbying expenditures. General Electric, which ranks 17th among federal contractors in contract awards, ranks 1st in lobbying expenditures since 1997, spending over $84 million.

Although the amounts spent by government contractors on political contributions and lobbying are sizeable, they are a small investment for the return. Since 1997, the top 20 contractors have received nearly $560 billion in government contract dollars – meaning they spent an on average of 8 cents on campaign contributions and lobbying expenditures for every $100 they received from the federal government in contract awards. Lockheed Martin, the largest recipient of contract awards, has spent only 4 cents per every $100 awarded by the government – half as much as the average contractor. Of course, not all money spent on lobbying and political contributions is directly tied to government contracts – for example, contractors seek favorable tax policies and environmental regulations.

Another way contractors gain influence is to hire away civil servants and political appointees with access to inside people and information from their government positions, often offering higher salaries, bonuses, or other inducements. In some cases, highly-skilled and well-connected former senior government officials, many of whom have worked for the Department of Defense (DoD) or in Congress, enter the private sector as executives or lobbyists, or on the boards of directors of government contractors – a practice known as the "revolving door." (Appendix A).

The revolving door has become such an accepted part of federal contracting in recent years that it is frequently difficult to determine where the government stops and the private sector begins. The practice of senior federal employees going to work for the federal contractors over which they had authority creates six critical problems:

(1) It provides a vehicle for public servants to use their office for personal or private gain at the expense of the American taxpayer;

(2) It creates an opportunity for government officials to be lenient toward or to favor prospective future employers;

(3) It creates an opportunity for government officials to be lenient toward or to favor former private sector employers, which the government official now regulates or oversees;

(4) It sometimes provides the contractor with an unfair advantage over its competitors due to insider knowledge that can be used to the benefit of the contractor, but to the detriment of the public;[5]

(5) It has resulted in a highly complex framework of ethics and conflict of interest regulations. Enforcing these regulations has become a virtual industry within the government, costing significant resources, but rarely, as the record shows, resulting in sanctions or convictions of those accused of violating the rules; and

(6) The appearance of impropriety has two significant negative implications. First, it exacerbates public distrust in government, ultimately resulting in a decline in civic participation. Second, the vast majority of career civil servants do not use their government jobs as stepping stones to high paying jobs with government contractors, and it demoralizes them to see their supervisors and co-workers do so.

The revolving door is a story of money, information, influence, and access – access that ensures that phone calls get through to policymakers and meetings get scheduled. The American taxpayer is left with a system that sometimes compromises the way the government buys goods and services from its contractors. This report will discuss the practice of senior government officials leaving public service to work with government contractors; the complex system of ethics and conflict of interest laws; and the connection between campaign contributions and lobbying expenditures, and contract awards, which creates an appearance that the government is not for the people, but for the biggest contributors.

The DoD, pursuant to 10 U.S.C. §§ 2397-2397c, kept statistics of former civilian and military employees hired by private contractors.[6] (Appendix B). However, that statute was

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[5] An unfair advantage can extend beyond the narrow legal definition in 48 C.F.R. § 9.505(b) (2004), which states:

> [A]n unfair competitive advantage exists where a contractor competing for award for any Federal contract possesses --
> (1) Proprietary information that was obtained from a Government official without proper authorization; or
> (2) Source selection information (as defined in 2.101) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.

[6] John S. Long, *Pentagon 'revolving door' turning faster: Hiring of top officials by contractors up 491%*, Cleveland Plain Dealer, Aug. 1986, at 25.

repealed in 1996 and, as a result, ending any illusion of transparency of DoD's revolving door. POGO attempted to find current revolving door statistics by contacting the Office of Government Ethics (OGE) and DoD, but both agencies stated that they do not keep those records. Each year there are approximately 2,500 senior government officials and military officers who serve in positions that directly affect government programs and policies.[7] Of that pool of employees, POGO focused on those officials who left the government and went to work for the top 20 government contractors – offering a snapshot of the revolving door. Because the government no longer records post-employment statistics, it is unclear whether the revolving door is spinning faster. Nonetheless, it is clear that this is a government-wide problem that has become commonplace. The chart below summarizes the number of former senior government officials who went to work for the top 20 government contractors between January 1997 and May 2004.

Chart 2. Senior Government Officials Turned Current or Former Contractor Executives, Directors, or Lobbyists 1997 through 2004

Company (Based on contract dollars in FY 2002)	Total # of Executives	Total # of Directors, Members, or Trustees	Total # of Lobbyists	**Total**
1. Lockheed Martin	16	6	35	**57**
2. Boeing	11	4	18	**33**
3. Northrop Grumman	5	8	7	**20**
4. Raytheon	6	9	8	**23**
5. General Dynamics	5	11	3	**19**
6. University of California	1	4	1	**6**
7. United Technologies	1	8	2	**11**
8. Computer Sciences Corp.	2	0	1	**3**
9. Bechtel	2	2	2	**6**
10. Science Applications International Corp. (SAIC)	9	3	4	**16**
11. Carlyle Group	1	16	5	**22**
12. TRW	4	5	1	**10**
13. AmerisourceBergen	0	2	0	**2**
14. Honeywell International	1	3	1	**5**
15. Health Net Inc.	0	0	4	**4**
16. British Nuclear Fuels (BNFL)	1	4	4	**9**
17. General Electric	4	1	14	**19**
18. L3 Communications	7	1	2	**10**
19. California Institute of Technology	0	5	0	**5**
20. BAE Systems	1	8	2	**11**
Total	**77**	**100**	**114**	**291**

[7] The 2,500 senior government officials include military officers ranking O-7 and above, DoD Senior Executive Service (SES) officials (including the Office of the Secretary of Defense, Air Force, Army, and Navy), and presidential appointees. *available at* http://www.opm.gov/ses/d02chart6.asp *and* http://web1.whs.osd.mil/mmid/military/RG0402.pdf, *and* http://www.appointee.brookings.org/.

According to POGO's investigation, at least one-third of the high-ranking former government employees who went to work for or serve on the board of a government contractor were in agency positions allowing them to influence government contracting decisions.

At least two-thirds of the former Members of Congress who are lobbying or have lobbied for the top 20 government contractors served on the Authorization or Appropriations Committees that approved programs or funds for their future employer or client while they served in Congress. Those committees included: Armed Services, Appropriations, Intelligence, Ways and Means, and Commerce. Since 1997, Lockheed Martin has hired twice as many former Members of Congress as the next closest contractor.

POGO's investigation into former senior government officials who work or worked with the top 20 government contractors included employees listed on contractors' web sites, government filings (i.e., Lobbying Reports and Securities and Exchange Commission 10K annual reports), and contractor documents. In addition, POGO contacted government ethics officials at OGE and DoD who provided conflict of interest and ethics guidance and offered suggestions on improving the system.

III. REVOLVING DOOR CASE STUDIES

The revolving door is the entry point for many senior government officials leaving public service to work for a private company. In some cases, the door revolves full circle and former government officials reenter government service. The question is: What is it that makes former government officials attractive as a new hire to a federal contractor?

Too often, when it comes to government contracts, "[t]he message is: if you really want to win an important contract, hire someone who has inside information; not necessarily source selection information on the current procurement, but information relating to the predecessor contract or the incumbent contractor. In a close competition, it may prove critical to success, and the risk of adverse action if anyone protests is minimal."[8]

In an April 19, 2004, Federal Times investigative report on the impact of the revolving door, government officials explained the inherent conflict of interest when government auditors pass through the door to the other side.[9] One Defense Contracting Management Agency (DCMA) official stated: "People who have been in those kinds of positions know where the holes are .... They know where we don't have any teeth."[10] Another DCMA employee stated that

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[8] Lieutenant Colonel Richard B. O'Keeffe, Jr., *Where There's Smoke ... Who Should Bear the Burden When a Competing Contractor Hires Former Government Employees?*, 164 Mil. L. Rev. 1, 22 (2000), *available at* http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/276081%7E1.pdf.

[9] David Phinney, *Defense's Revolving Door: When Managers Join Contractors, Good Oversight Takes a Hit, Auditors Say*, Federal Times, Apr. 19, 2004, *available at* http://federaltimes.com/index.php?S=2830672.

[10] *Id.*

Bipartisan Campaign Reform Act) banned soft money contributions. The United States Supreme Court upheld the soft money ban in 2003.[80]

VI. POGO's RECOMMENDATIONS

A. The Revolving Door

1. **Simplify the complex system of laws, Executive Branch regulations, department and agency regulations, executive orders, and agency directives that add ambiguity to government ethics laws.** Repeal the multi-tiered system of laws and regulations and incorporate required provisions in a clear and consistent model rule of ethical conduct for the entire federal government;

2. **Prohibit, for a specified period of time, political appointees and Senior Executive Service (SES) policymakers (people who develop rules and determine requirements) from being able to seek employment from contractors who significantly benefitted from the policies formulated by the government employee;**

3. **Require government officials to enter into a binding revolving door exit plan that sets forth the programs and projects from which the former employee is banned from working.** Like financial disclosure statements, these reports should be filed with the Office of Government Ethics and available to the public. This requirement would benefit government employees who are unaware of or confused by post-government restrictions or who have multiple post-employment bans covering different time periods. It would also enhance public trust in the government;

4. **Require recently retired government officials and their new employers to file revolving door reports attesting that the former government employee has complied with his or her revolving door exit plan;**

5. **Prohibit government employees from overseeing or regulating their former private sector employer;**

6. **Close the loophole that allows former government employees to work for a department or division of a contractor different from the division or department that they oversaw as a government employee;**

7. **Establish an Executive Branch-wide law for federal government employees, requiring notification of recusal or disqualification to a supervisor;**

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[80] *McConnell v. Fed. Election Commn.*, 540 U.S. ___, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003), *available at* http://www.supremecourtus.gov/opinions/03pdf/02-1674.pdf.

8. **The Office of Government Ethics should provide enhanced oversight of private sector employees who enter public service.** Those types of revolving door cases should receive enhanced oversight because government officials may be placed in positions in which they regulate or oversee programs and policies that may affect their private employer.

B. Money & Contracting

1. **Congress should restore the pre-1976 prohibition on contractor campaign contributions thereby assuring the American public that contractors' contributions are not driving contracting decisions.**

C. Federal Advisory Boards

1. **Remove or modify conflict of interest and Freedom of Information Act exemption and waiver provisions for advisory board members and ensure that unclassified portions of board meeting minutes are publicly available**; and

2. **Enact Executive Branch-wide law requiring federal advisory committee members to recuse or disqualify themselves from any discussion on matters where they or their private employer or client have a significant financial interest.** This disclosure or recusal statement, including name, title and employer should be filed with the Office of Government Ethics and made publicly available;

D. Lobbying

1. **Increase the one-year ban on lobbying for Members of Congress and their senior staffers who have a nexus between authorizations or appropriations authority over their post-government employer**; and

2. **Paid contractor consultants should be required to register with the Office of Government Ethics.** Many former government employees are hired to promote a contractors agenda and the current system does not prove any transparency of those actions.

Attachment C

"Where in Federal Contracting?"

Where in Federal Contracting?2

The Wifcon Blog

wifcon.com

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Where are . . .

new federal contracting regulations and contracting news?	Today's News
listings of today's grants, agreements, new policy, and news?	Today's Grants
discussions on federal contracting?	Wifcon Forum
federal contracting issues analyzed?	Analysis
legal, association, and industry sites on contracting?	Associations
book and article reviews for the contracting community?	Book Review
opportunities for careers in contracting?	Careers
other online conversations on contracts?	Other Chat Sites
online court cases dealing with federal acquisition?	Courts & BCAs
conferences, hearings, and meetings dealing with federal contacts listed?	Events
archived discussions from the wifcon forum?	Forum Archives
listings, archives, policy, libraries, and data relating to grants and agreements?	Grants & Agreements
contracting handbooks, manuals, tool kits, training programs, and publications?	Guidance
international contracting sites?	International
key federal contracting laws?	Law
federal contracting newsletters?	Newsletters
bid protest decisions analyzed?	Protests
classic documents, books, and guides?	Publications
federal contracting regulations that are available for public comment?	Public Comment
business opportunities, contracting aids, government e-malls, etc.?	Quic-Kit
online federal contracting regulations?	Regulations
changes in federal contracting policy archived?	Regulatory Archives

small business sites that help with federal contracting matters?	Small Business
over 160 governments with contract offices, regulations, laws, and associations?	State and Local
proposed senate and house federal contracting legislation?	Today's Legislation
training and publication sites for contracting professionals?	Training
the webmaster's credentials?	Webmaster

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Attachment D

"An Assessment of Today's Federal Procurement System"
by Judge Stephen M. Daniels
Chairman of the General Services Board of Contract Appeals
August 15, 2002

AN ASSESSMENT
OF TODAY'S FEDERAL PROCUREMENT SYSTEM

REMARKS OF STEPHEN M. DANIELS
CHAIRMAN,
GENERAL SERVICES BOARD OF CONTRACT APPEALS

OFFICE OF FEDERAL PROCUREMENT POLICY LECTURE SERIES
AUGUST 15, 2002

The 1990's were a great time in America, and especially a great time for business in America. Or were they? With each passing week, there seem to be more revelations that cause us to question whether the truths that were generally perceived back then are as real as we once believed.

Remember how stock prices would go up and up and up on an almost daily basis? And why not? After all, we were told, shares of dot-coms were worth vast multiples of earnings (or even of anticipated future earnings, for those companies that were not making any money). And all sorts of very big companies were making tremendous profits – or so they said. Private businesses were supposed to be engines driving an economic boom that would make all Americans rich and build bonds that would unify peoples throughout the entire world.

Yes, business was great – and business practices were even better. Business practices were so good that if we wanted to make Government work well, we needed to remake Government processes in the image of business.

We're all a little older and wiser now. We know that the stocks of dot-com companies were enormously overvalued – if those stocks ever had any value at all. The prices of stocks of many other companies were inflated, too – based on some pretty gross accounting tricks and other forms of dishonest behavior. Multinational companies may eventually be a helpful force in bringing about a prosperous, cooperative world – but there seems to be more than a bit of divisiveness on our planet right now. Maybe – well, more than maybe – we have learned that some of those business practices at whose shrine many in Government worshiped are not quite all they were cracked up to be.

Some of those good business practices that we were told to follow were business procurement practices. We were supposed to remake, or "reinvent," or "reform," Government procurement along different lines – what was said to be the business way of doing things. And we did. Government procurement is conducted today in ways which are considerably different from the ways in which it was conducted only a decade ago.

But are the current ways really better than the old ones? Or, to ask the question in a bit more sophisticated manner, in making significant changes, have we abandoned too much of the old? Are the ways in which the Government acquires goods and services today genuinely superior, as their proponents told us they would be – or do they deviate so far from fundamental principles of Government procurement, and incorporate so much of the Enron/WorldCom/whatever-company-is-in-the-news-this-week style of business practices, that they are actually counter-productive?

These are important questions for those of us in the Government procurement world – and for all American taxpayers. I don't mean to sound like the Cassandra of Government procurement, but I did raise similar questions during the past decade, as the "reinventions," or "reforms," were taking hold. Only a few brave souls were willing to acknowledge that they were even listening back then. I'm very much encouraged to see that our Government now has an Administrator for Federal Procurement Policy who is interested in hearing what people have to say about the answers to these questions, in promoting an open and honest discussion on the subject, and in leading the effort to bring balance to our procurement system by combining the best of the new and the old. Understanding that this effort is under way, I was willing to accept her invitation to come here today to share my views with all of you.

I want to acknowledge at the outset my background and my biases. I was a staff member of the House of Representatives' Government Operations Committee – now called the Committee on Government Reform – for nearly 15 years. That committee, then and now, has been responsible for originating legislation which sets the Government's fundamental procurement policies. I worked for a committee leader who had been a member of the Commission on Government Procurement in the early 1970's, and who worked cooperatively with other members of the House and Senate, on both sides of the aisle, to make the procurement system follow the principles enunciated by that Commission. Those principles found a home most notably in the Competition in Contracting Act of 1984, or CICA. I will discuss them in a minute, but for now, I will confess that I continue to believe that they are critical guidance for a successful Government procurement system.

I left the Government Operations Committee in 1987, when I was named a judge on the General Services Board of Contract Appeals, and I have remained a judge on that board ever since. For my first nine years as a judge, the board heard and decided protests involving the procurement by Federal agencies of what is now called information technology resources. This work involved interpreting and applying the Competition in Contracting Act and the regulations which implemented it. Hearing protests reinforced my belief in the validity of the principles of the Act, including the merit of enforcing those principles, as critical to the successful operation of the Federal procurement system.

For the past six years, since the Board's protest authority has been revoked, I have focused my activities on hearing and resolving disputes which arise in relation to Government contracts which have already been awarded. While this work teaches me a good deal about how not to administer contracts, it doesn't give me the ringside seat I once had on how agencies choose the companies with which they do business. But I do follow these activities from a distance, and I do think about how they relate to the principles that guided Government procurement until the past decade. It is these thoughts that I would like to share with you today.

I also want to make clear that everything I tell you represents my own opinions. I am not here representing the General Services Board of Contract Appeals, the General Services Administration, the United States Government, or anyone else. One of the privileges and responsibilities of being a judge is to be independent – to give your own honest views on subjects you address, regardless of the political fallout. That is what I am here to do.

Let's begin with the principles of the Competition in Contracting Act of 1984. I want to emphasize that these were hardly new principles at the time. They had been evolving since the early years of the Republic and had come to represent common wisdom. There are, I think we can distill, four guiding principles:

First, the opportunity to sell goods and services to Government agencies must be open to everyone. The system must be democratic; it cannot presume that simply because a capable vendor is unfamiliar to an agency, the agency can't benefit from doing business with him or her.

Second, vendors' offers must be evaluated fairly. The chance to bid cannot become a sham; equal opportunity must be an ingrained practice, not just a slogan.

Third, the agencies must select for contract award the offers that are in the best overall interest of the taxpayers. Genuine economy is the goal; there is no sense in being penny-wise and pound-foolish.

Fourth, the system must be transparent so that participants and taxpayers understand how it is being operated and can hold agencies accountable for their actions. The best way of maintaining the integrity of the system is to give vendors who believe they have been treated unfairly a full and fair chance to air their grievances. Impartial reviewers can then hold the agency personnel's feet to the fire to make sure they remember the importance of the first three principles.

As you will notice, these fundamental precepts of Government procurement are not necessarily business principles. They are principles of political philosophy designed with the interests of the taxpayers foremost in mind. Although the Government can learn

from the private sector, in some respects it can never operate in the same manner as do business concerns. The success of a private company can be measured easily and objectively through profits and losses. An actual or prospective investor can readily perceive whether the company is being managed effectively; if it is not, the investor can sell stock or choose not to invest. Taxpayers, by contrast, cannot choose not to pay taxes. Even if they could, it would be very difficult for them to determine whether their money was being spent wisely. The missions of Federal agencies cannot be measured by profit and loss statements. Whether an agency is operating effectively is a highly subjective matter. Furthermore, purchasing activities are ordinarily secondary to the agency's mission, with the result that evaluating the performance of procurement officials is extremely difficult if not impossible. Government officials owe a much higher degree of duty to the people for whom they perform – the taxpayers – than do their private sector counterparts to stockholders. They owe the duty of adherence to the basic political principles I have just identified – openness, fairness, true economy, and accountability.

And yet, though our traditional procurement system as exemplified by CICA was designed around political principles, rather than supposed business principles, that system, in design, represented the triumph of capitalism at its best. It channeled the creative, competitive impulses of private businessmen and women into developing more innovative solutions to Government problems and giving agencies the best possible prices for those solutions. Real competition in the Government marketplace should bring about the same kind of benefits for the Government that it provides throughout the general marketplace to each of us as consumers.

There were plenty of specifics in CICA that implemented the principles I just described. The law had as its watchword "full and open competition." It imposed tougher standards for justifying and approving exceptions to competition, so that sole-source contracting would be reserved for those instances in which it was truly necessary. Procurements had to be publicized, through notice in the Commerce Business Daily – now it would be FedBizOpps – so that potential suppliers would know of contracting opportunities. CICA was also another step forward in the effort to create a single, unified system of procurement. Reducing agency-specific peculiarities in the process strengthened competition, because it eliminated the handicap to companies that could offer good products at good prices, but weren't plugged into those unique ways of doing business. Finally, CICA strengthened bid protest procedures as an enforcement mechanism designed to ensure that the mandate for competition is implemented and that vendors wrongly excluded from competing for Government contracts receive equitable relief.

Although some parts of CICA remain on the statute books, the guts have been ripped out of it. Openness, fairness, economy, and accountability have been replaced as guiding principles by speed and ease of contracting. Where the interests of the taxpayers were once supreme, now the convenience of agency program managers is most

important. Full and open competition has become a slogan, not a standard; agencies have to implement it only "in a manner that is consistent with the need to efficiently fulfill the Government's requirements." [10 U.S.C. § 2304(j); 41 U.S.C. § 253(h).]

It is now much easier to acquire goods and services without competition. Notice requirements have been reduced, particularly as the Government increasingly fulfills its needs without conducting formal procurements. The drive to have the Government present a single face to industry has been sent into retreat: agencies have been given greater discretion to procure in their own idiosyncratic ways, Government-wide regulations have been discarded or diminished in importance, and programs and whole agencies (the Federal Aviation Administration being just the first) are being allowed to procure under unique and sometimes vague rules and procedures. The bid protest forums which tended to allow parties to develop facts most fully, and consequently to grant the greatest percentage of complaints – the General Services Board of Contract Appeals and the United States District Courts – have been stripped of their authority to hear protests.

What about these differences? Change can be either good or bad, and it usually has elements of both. The challenge for all of us in the Government contracting field, whether we're in Government or industry, is to manage that change so that the procurement system doesn't get out of kilter. Government succeeds or fails by the confidence of the governed in its fairness and effectiveness. So it is with the procurement system. If the public loses confidence in the system, it will fail. It will not deliver the goods and services that agencies need to perform their missions well, and what it does deliver will not necessarily be at reasonable prices. We procurement professionals need to make sure that at the same time we focus on efficiency and speed, we don't lose sight of the ultimate purpose of the system, which is to serve the taxpayer well.

When the Government contracts for goods and services, it has to spend money in three ways: conducting procurements, administering contracts, and paying for the goods and services themselves. The design for the way we contracted in the past emphasizes savings in the third group – the costs of paying for the goods and services. And this is as it should be. The Federal Government spends about $240 billion a year through contracts, and this figure appears to be growing rapidly. Unless the laws of supply and demand were repealed when no one was looking, it should remain obvious that competition results in firms improving their products and/or reducing their prices to win contracts. Studies have indicated that looking to costs alone, competition can save the Government between 15 and 50 percent of what it ultimately pays for goods and services. Thus, competition can save several tens of billions of dollars – possibly more than a hundred billion dollars – on Federal procurement every single year. We're talking real money here, even by Federal budgeting standards.

The current approach to contracting emphasizes the first group of costs I identified – the costs of conducting procurements. I have never seen an estimate of how big this

amount is, but I'll wager that it is just a tiny fraction of the $240 billion a year that the Government spends on goods and services themselves. The current approach aims at saving part of this little sum. And it may well be succeeding. But whether it does or not won't matter much if it has a deleterious effect on the total price taxpayers pay for the goods and services.

Let's take a look at some of the ideas associated with the current approach. I'll discuss four groups of ideas – organizational structure, emphasis on past performance of vendors, methods of contracting, and the personnel who actually do the contracting. Then I'll close with a couple of thoughts about ramifications of the approach which are critical, but rarely mentioned.

I'll begin with organizational structure. An important theme of Government over the past decade was "empowering" personnel, bureaus, and agencies to acquire things using their own rules, regulations, and practices. As our Government has grown, a constant hallmark of its operation has been disputes between central managers, who want things to run in accordance with standardized principles, and the folks in the agencies and bureaus, who want to be free to pursue their own interests in their own ways. For at least a half-century, in the procurement area, the centralizers were gaining. Under a unified set of regulations, variations in procurement practices among agencies and bureaus had been reduced to the point at which people in private industry knew to a pretty good degree what to expect when they set out to do business with the Government.

In the '90's, however, centrifugal forces gained the ascendancy. The Government became less of a unified whole, and more of a collection of quasi-corporate entities. As these entities do business each in its own way, the basic rules under which procurements take place, like the mechanisms for enforcing those rules, have been weakened.

These changes have created much greater uncertainty about the way in which procurements are conducted. Uncertainty, as anybody who has ever put together a bid or proposal knows, drives potential competitors out of the market and drives up the prices of those who stay in; if a bidder doesn't account for eventualities that might arise, and they occur, he can lose his shirt. Leaving major decisions to individual discretion in individual procurements can have devastating consequences for the prices the Government pays for what it buys.

The uncertainty is more than just momentary coping with change. As different agencies – and different procuring activities within those agencies, and probably even different program and contracting officers within those procuring activities – use different ways to acquire goods and services, potential suppliers face this problem: To the extent that the Government is like a single customer, each company has to spend a certain amount of money to get to know that customer's procedures and practices. If the Government becomes many customers, each firm is going to have to increase that kind of

spending many times. Small companies have to restrict their learning budgets to a limited range of customers, so as the Government becomes fragmented, those companies won't have any real chance of satisfying the needs of as many agencies as they might have before.

Government officials who are encouraged to creatively reinvent procurement practices in unique ways have to realize that the more they do this, the more likely they are to cost the taxpayers money. We can save significantly by preserving a large pool of potential suppliers, cutting overhead costs for each one, and cutting overall prices naturally through competition. A unified approach is necessary to meeting these goals. There is no incompatibility, I should add, between uniform basic practices and creative means of implementing those practices with greater efficiency.

Another aspect of the current approach is to give greater importance to firms' past performance – or reputation – in choosing contractors. The Government has always paid attention to past performance, of course. For decades, it used responsibility determinations to keep from getting stuck with contractors who don't have the financial and other capabilities to perform in accordance with their promises. But there is now an increased emphasis – often an over-emphasis – on past performance as an evaluation factor in negotiated procurements. Some contracting officers are writing solicitations that make reputation at least as important as technical merit or cost in evaluating proposals.

There are a number of difficulties with awarding contracts primarily on the basis of reputation. First, reputation is an inherently subjective measure, but the current procurement scheme requires that it be quantified so that it can be compared to other evaluation factors. By relying heavily on a quantification of an unquantifiable factor, every award decision is of suspect validity.

Even if quantification could be accomplished, while it would be quick and easy to award contracts primarily on the basis of reputation, it wouldn't be very smart. Agencies are buying promises of goods and services to be supplied in the future, not the past. Agencies that buy based on reputation would miss out, for example, on much of the innovation that has been going on in the computer industry, where new and small businesses have been the source of many of the terrific advances taking place in hardware, software, and creative resolution of problems. Government officials have to fight the temptation to overvalue reputation if they want to act, as they are supposed to act, as the taxpayers' proxy.

The need to apply reputational judgments judiciously has impacts far beyond individual procurements. We hear a lot these days about greater partnerships between Government and industry, and of course better communications have the potential for good on both sides. But we have to remember that there isn't a single "industry." Whether a firm is a part of the "industry" that participates in those informal

communications has become critical to the company's ability to compete for and win contracts. Reputational judgments, like many forms of regulation, tend to exclude new entrants from the marketplace.

The use of past performance ratings has implications for restricting companies' legal rights and privileges, as well. The number of protests and contract claims has declined markedly over the past decade. Several lawyers and company officials have suggested to me that this is because "it's not cool" to object to Government actions any more. "It's not cool" is code for "I'm afraid that if I do it, my performance ratings will suffer, and I'll lose the chance for future contracts."

Handled the wrong way, past performance, with its impact on inclusion in the club of "industry partners," has become a hammer with which Government forces companies to give up rights, and ultimately money, for the opportunity to stay in the contracting game. And as valid protests are not filed, the taxpayers suffer – they are denied the benefits that come with informed oversight of the procurement system. Protests of course do have short-term costs in terms of delayed procurements and diverted activities of Federal employees involved in a procurement. But in exchange for these costs – a trade-off that the current approach doesn't take into consideration – protests keep participants in the system alert to wrongdoing, educate them to practices found by an unbiased observer to be fair or foul, thereby instill discipline in the way in which agencies acquire things – and most important, preserve the true competition that brings down prices and improves the quality of product offerings. Similarly, if companies know in advance that they will be strongly dissuaded from litigating contract disputes, they may well increase their prices so as to remove some or all of the risk they face in not being able to recoup later incurred, but initially unexpected, costs they feel should be legitimately paid by the Government. The taxpayers may pay more in the long run than they would if the companies thought they could enforce their contract rights.

Let's move on now to a third aspect of the current procurement system, methods of contracting.

I'll begin with a couple of notes about competitive contracting – and I'll be brief here because this method of contracting, which used to be the paradigm, isn't used so much any more. A significant problem here is the use of contracting techniques which, like heavy emphasis on past performance, lead to highly subjective decisions for which accountability is limited or nonexistent. One is the increased use of oral solicitations, without any limitations, and, even for written solicitations, making contract awards on the basis of oral proposals. There may be no record of what transpired in what passed for a competition – and even if there is one, it will be so skimpy that proving a decision was sound or not will be very, very hard. Both sides may later regret that their contract rights and responsibilities were ill-defined, as well.

Agencies are also limiting, in the interest of efficient contracting, the numbers of firms allowed to compete in individual procurements. As this happens, some companies which submitted proposals that stood a reasonable chance of award will find themselves on the outside looking in. The message to them will be: "I'm sorry, your offer – you know, the one on which you've spent tens of thousands, or maybe even hundreds of thousands, of dollars – had a reasonable chance for award, but for reasons of administrative convenience, we decided that negotiating with you wouldn't have been worth the trouble. It wouldn't have been efficient." Whether those firms could have improved their proposals after discussions, and thereby given the taxpayers a better deal, will be immaterial. What sense does this make? We have to guard against designing a procurement system in which the secret to success is clever marketing or access to the "right" individuals. We don't need a system that favors slick over solid, lucky over smart, the well-connected insider over the ordinary citizen. The ability to limit competitive ranges must be used carefully.

These are problems with actual competitions, in which companies choose to participate after having notice that they exist. But they pale in comparison with the difficulties that result when the competitions are limited without any notice of their existence at all. More and more, this seems to be the preferred way for agencies to do business. It creates impediments and challenges to keeping the procurement system the servant of the taxpayer.

One of the favorite methods of acquiring goods and services without real competition is the use of umbrella task and delivery order contracts. Agencies issue wide-ranging contracts to a number – often a very large number – of firms, and when they need something, they pick one of those firms to give it to them. These contracts are inherently biased against small business, because a small vendor who can provide the item to be ordered but not the wide range of items under the contract is excluded from any consideration. Even if that vendor could provide that item well and at a better price than could be had from one of the big companies that has a contract, it cannot get the business.

A further problem with umbrella contracts is that even among the big firms that do have the contracts, agencies have practically unfettered discretion in making awards of task or delivery orders. The prospect of abuse is readily apparent: agencies award contracts to most companies that want them, and choose later, for reasons of convenience rather than best value, which ones will get the orders. This process empowers procurement officials without giving them standards against which to make selections. The concept has some utility where differences are measurable, which is frequently true for goods, but where the differences are very difficult to gauge, which is often true for services, the use of umbrella contracts makes decisions about who gets contract money highly subjective. Because the laws about competition (and protests to enforce it) don't

apply to the issuance of delivery and task orders, we may never know whether the use of umbrella contracts gives taxpayers beneficial results.

Another way agencies are acquiring goods and services without real competition is by placing orders against multiple award schedule contracts and their cousins, Government-wide acquisition contracts. These vehicles are basically agreements against which specified items may be ordered; the orders automatically incorporate the terms and conditions of the contracts.

CICA gave its blessing to the multiple award schedule program as a form of full and open competition. These contracts should be used, though, Congress explained, only when the Government can negotiate quantity-discount contracts, with delivery to be made directly to the using agencies in small quantities at diverse locations. These limitations are not being observed. Agencies are using schedule contracts to purchase items in large numbers, without any maximum ordering limitations. The dollar values of individual schedule buys are reaching the billion dollar range.

Agencies don't have to announce their use of this program in advance, as they once did. They can simply compare catalog prices or even ask a few pre-selected vendors to give prices, which may change on an order-by-order basis, and then choose a winner. This practice is nice and easy. It's not fair to all potential offerors, though; to have a shot at making a sale, a company must be a member of the "club" chosen in advance by the agency. And it's not fair to the taxpayers, either; they ought to be getting the best deals capable vendors can offer, not the results of secret competitions among a limited in-crowd of companies.

A year ago, the General Services Administration's Office of the Inspector General issued a report which concluded that GSA is not consistently negotiating most favored customer prices for multiple award contracts; many multiple award contract extensions are accomplished without adequate price analysis; and preaward audits are not being used effectively to negotiate better schedule prices. Yet the use of the contracts continues unabated, to the tune of about $15 billion a year. It's much easier than conducting competitive procurements – ergo, in today's world, it's better. But is it really economical, let alone fair? Proponents of buying off the schedules don't seem to care.

Agencies are also using undefinitized vehicles, like letter contracts, to buy things as large as construction of massive buildings. Instead of figuring out in advance what to build, and then taking bids to construct it, agencies are issuing letter contracts which say not much more than, in exchange for a price to be determined later, not to exceed X million dollars, a company agrees to build a building about so big to be used for such-and-such a purpose. There is no telling on what basis an agency might select a contractor to perform under this kind of contract. There is a high likelihood, though, that unless

agencies are very generous to those contractors, the determination of how much to pay for work performed will be contentious.

Finally, the Government has handed out credit cards to untold numbers of employees for the purchase of – well, if you've opened a newspaper or watched a TV news show recently, you know that some of those employees have been purchasing all sorts of things that don't exactly meet Government requirements. In our haste to make buying easy, we haven't paid enough attention to controlling what is bought. And no matter how small the number of abuses of credit card privileges, or how few dollars have been involved, the media coverage of this form of ease of acquisition has brought public discredit on the entire Government procurement system.

On to the next aspect of today's procurement system: Who is going to be responsible for all these innovative procurements? The current approach has as one of its maxims that simpler procurements need fewer professionals to conduct. And consistent with this maxim, at the same time that greater discretion is being given to Government procurement personnel, the number of those folks has been reduced, in part by enticing the veterans who know how to get things done out the door through buyouts. What we need to be asking, but aren't, is, How big an investment in trained personnel does the Government need to do its job well? Significant personnel cuts force the contracting professionals who remain to do more work than they are capable of. Government officials are going to have to work hard to keep this trend from going too far.

An inevitable consequence of the personnel cuts, and the new demands on the time of the contracting officials who remain, is the temptation to cede more authority for procurements to the program offices for which the contracting personnel are doing the buying. This is a real problem. Program offices generally want whatever they need immediately, and as long as the contracting staff can bring it in within the budget for the acquisition, they don't particularly care how much it costs or how it was bought. The problem is made especially acute by the way the Government does its budgeting: an office gets its funding year-by-year, and frequently doesn't know how much it has for a procurement until toward the end of a fiscal year. Then it wants to buy right away, because the funding won't necessarily be provided next year if it isn't spent this year. Whether the taxpayer gets a good deal is off the radar screen for many of the people in program offices.

For many years, procurement professionals have been the taxpayers' line of defense against these inclinations. The procurement process, within the Government, has traditionally been marked by a creative tension between contracting and program officials. While the program people have wanted to buy things fast and easily, the contracting staff have put competition, with its consequent savings, first. The current regime has tilted the balance of this creative tension. The contracting personnel are

having a tough time holding up their critical end of the process, and thereby avoiding being demoted, effectively, from professional managers to clerical assistants.

Contracting personnel also need to be on the lookout, more than ever, to guard against political or unethical influences on procurement decisions. One of the problems with a less structured process is that it makes it easier for people with power to exert improper influences on award decisions. Those of us in the Federal Government procurement community are justifiably proud that with some regrettable exceptions, our procurements have been honest and apolitical. As the culture of procurement changes, we must be on our toes to ensure that this aspect of that culture does not suffer.

I promised you earlier that before concluding, I would discuss a couple of ramifications of the current procurement environment that are important, but rarely mentioned. Let me get to them now.

One is the impact of the past decade's changes on what the Government buys. Under the old style of buying goods and services, which was the paradigm under CICA, an agency had to very carefully decide exactly what it needed to acquire, and then present to vendors a statement of work against which it would solicit bids or offers. The vendors would often ask questions about the agency's requirements in the course of the procurement, thereby forcing the agency to think even more closely about what it needed. Then a contract would be awarded and, usually for a firm, fixed price, the contractor would provide what the agency had requested.

Under the current system, as it has developed over the past decade, an agency doesn't have to perform the hard work of defining requirements, partially in response to vendor questions, before awarding a contract. The agency can simply use one of the non-competitive contract vehicles I described earlier – award a contract on the basis of undocumented oral proposals, place a delivery order against an umbrella or schedule contract, or write a sketchy letter contract – and define its requirements later.

There are two principal problems with this approach. One is that by not thinking through in advance exactly what the agency needs, the program officials may wind up with two unwanted results. First, they may need longer to get the job done, since they will be re-thinking it on the fly. Second, they may also pay considerably more money for the results obtained, since far more of those results will have to be purchased on a time-and-materials basis. Purchasing on that basis is inevitably more expensive than buying under a firm, fixed price contract arrived at in a competitive environment. It also contains many of the elements of cost-plus-a-percentage-of-cost contracting, which Congress found so disadvantageous that it has prohibited that method from being used.

The other problem is more insidious: The agency officials who enter into the contracts without any concrete idea of their true requirements may never understand

exactly what they need, and by default leave to the contractor the opportunity to define the requirements. And of course this situation tempts the contractor to provide not what a conscientious public servant might decide was necessary, if he or she were forced to write a statement of work that would be subjected to careful scrutiny in a competitive procurement, but rather, what the contractor has available to sell – and at the greatest profit margin. I might have spoken too soon in suggesting that the current system tilts the balance too much toward program officials and away from contracting personnel. The system tilts authority away from all Government representatives by making it all too easy for program officials to cede to contractors authority which is properly Governmental.

The other thought I'll leave you with concerns the international ramifications of the current Government procurement system. The United States has been making great efforts to open other governments' markets to fair, open competition in which American companies can participate. As our own Government abandons full and open competition, in favor of efficiency and unchecked discretion to choose business partners on the basis of reputation, how can we look our trading partners in the eye and demand that they do otherwise? For small savings in administrative spending on the procurement process, we may not only be costing the taxpayers big bucks in purchasing costs, but also undermining efforts to open large markets for American capital and labor abroad.

As you can see, I have serious doubts about the wisdom of some of the changes which occurred in the Government contracting world during the 1990's. These changes have attempted to make Government procurement more efficient by misguidedly cutting back on its most important cost-saving feature – full and open competition. Increased administrative efficiency is great. Indeed, it's an essential element of ensuring that taxpayers' money is spent wisely. But in my opinion, many of the changes have been pound-foolish, and some of them not even penny-wise.

I know from my own occupation that efficiency can be over-emphasized. I hear often, as I'm sure you do, that the legal process is inefficient. It takes too long, and it's too burdensome. I once offered parties who made those complaints an opportunity to have a truly efficient proceeding. The parties would not have to discover what really happened regarding their dispute, and they would not have to present the facts through documents and hearing testimony. They would not have to analyze those facts in the context of statute, regulation, and case law, and brief the matter to me. They wouldn't have to wait for me to write a decision. Instead, we would proceed directly to a highly efficient – and incidentally, fair – resolution of the case. I would simply flip a coin, and whoever called it correctly would prevail.

As I pulled a quarter out of my pocket, everyone else in the room began to sputter. Finally someone had the gumption to say that he didn't think it was appropriate to decide a case that way. Then everyone else said the same thing. And of course, they were right. Flipping a coin would have been efficient, but the parties to a lawsuit – and the taxpayers

who provide the tribunal which hears it – expect and deserve better. The public demands a judicial system which considers matters presented to it fully and fairly – and efficiently, too, but not efficiently, to the suppression of more critical values.

So it should be with the Government's procurement system, as well. Efficiency and ease of contracting are important. But we have not been careful enough in weighing increases in efficiency against the critically important values of openness, fairness, economy, and accountability. By diminishing those key values, we have damaged the system and created a pseudo-efficiency which, on closer inspection, has resulted in greater costs. The procurement system is far less faithful to the democratic and capitalistic impulses that it once reflected.

By disdaining full and open competition, we have sapped the system's greatest strength. We all know that a genuinely competitive marketplace works to the greatest benefit of all of us as consumers. Why shouldn't this engine of capitalism continue to benefit all of us as taxpayers, too?

Government procurement is an easy target for political rhetoric. But overall, it has been a system we can be proud of. Nearly a century ago, Mr. Justice Holmes wrote, "Men must turn square corners when they deal with the Government." [Rock Island, Arkansas & Louisiana Railroad Co. v. United States, 254 U.S. 141, 143 (1920).] And later Mr. Justice Jackson pointed out that the relationship is mutual: "[T]here is no reason why the square corners should constitute a one-way street." [Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 388 (1947) (dissenting opinion).] Government contracting in the United States has been, for longer than any of us can remember, marked by openness, fairness, economy, and accountability.

When people from many other countries hear how our system has worked, they are amazed. Where they come from, those in power award contracts with very little oversight, sometimes to their friends, sometimes even to themselves. That hasn't been our way – and we need to overcome the missteps of the 1990's to make sure it isn't.

An honest, open, fully competitive procurement system has enormous benefits for all of us -- potential suppliers, Government officials, and most important, taxpayers. If we put our minds to it, we can recover that kind of system and make Government contracting more efficient without limiting participation to a favored few contractors.

Attachment E

POGO's FY 2004 Funding List
& 2003 Annual Report

To View Annual Report see: http://www.pogo.org/p/x/reportlibrary.html#2003
(click on report cover to view a pdf of the report)

POGO's 2004 Foundation Grants

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